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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 763

HUGH GREER CARRUTHERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 503–515) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered December 27, 1945 (R. 516). The petition for a writ of certiorari was filed January 21, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the trial judge violated the First Amendment by charging the jury that the truth or falsity of petitioner's theories of breathing was not to be considered if found to be religious in character, where the indictment for mail fraud and fraudulent sale of securities was based on false representations of an intention to engage in business activities, and not upon the theories taught by petitioner.

2. Whether the trial judge abused his discretion by denying petitioner's motion for a mistrial based on newspaper publicity after the judge had ascertained by a poll of the jurors that only one juror had seen the article and that such juror had merely a vague recollection of its contents.

3. Whether it was reversible error to charge the jury that the presumption of innocence was not designed to enable one who was in fact guilty to escape.

STATUTES INVOLVED

Section 215 of the Criminal Code (18 U. S. C. 338) provides in pertinent part as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card,

package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

The Securities Act of May 27, 1933, c. 38 Title 1, 48 Stat. 74 (15 U. S. C. 77), provides in part:

SEC. 2. (1) [as amended, 48 Stat. 905] The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest

or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

* * * * *

SEC. 17. (a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud * * *

* * * * *

SEC. 24. Any person who willfully violates any of the provisions of this title * * * shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT

An indictment in 36 counts was returned against petitioner and two others in the United States District Court for the Eastern District of Illinois. Counts 1 to 9 charged the employment of a scheme to defraud in the sale of securities by the use of the mails in violation of Section 17 (a) of the Securities Act (R. 2–62); counts 10 to 35 charged use of the mails in execution of the scheme to defraud in violation of Section 215 of the Criminal Code (R. 62–141), and count 36 charged a conspiracy to violate the mail fraud statute and the fraud provisions of the Securi-

ties Act. Counts 5 and 9 were dismissed at the close of the Government's case (R. 290, 456). Petitioner was convicted on the remaining 34 counts (R. 487) and was sentenced generally to imprisonment for five years (R. 488–489).[1] On appeal, the judgment against petitioner was affirmed (R. 516).

The scheme to defraud is set forth in detail in count 1 of the indictment (R. 4–18). In substance it alleged that petitioner organized and controlled an unincorporated association known as the Neological Foundation; that by means of public lectures and radio broadcasts on economic development and spiritual improvement he induced persons to become members of the association and pay dues; that pamphlets, lessons and literature on various subjects were sent to members and prospective members of the Foundation; that petitioner represented himself as a person with numerous scholastic degrees and as an unusually successful businessman; that he purported to have the foundation engage in business activi-

[1] The court granted a motion for a verdict of acquittal on behalf of the two codefendants who were employed by petitioner (R. 470, 487). It is unnecessary to consider whether the acquittal of the codefendants, necessitates reversal of petitioner's conviction on the conspiracy count, since any one of the substantive counts supports the sentence imposed. The conspiracy count did charge that petitioner conspired with the two other defendants named in the indictment and with persons unknown (R. 141–142).

ties and solicited investments therein by members; that he represented that he had acquired a formula for a hair shampoo known as Nan-Gene and for a laxative known as Happy Hearts and solicited investments in the development thereof, promising to pay interest at 6% per annum plus a bonus of 4%; that he engaged in the sale and delivery of securities in return for such investments. The indictment further alleged that, as part of the scheme to defraud, petitioner made a number of false representations, including statements that investors in Nan-Gene, Happy Hearts, and the Foundation would be paid interest at 6% per annum plus a bonus of 4%, whereas petitioner did not intend to and did not engage in business activities and knew that the Foundation had operated at a loss and could not pay interest. It also alleged that petitioner represented that he was a wealthy man and that he would employ the money loaned to him to expand the activities of the Foundation, whereas he appropriated a substantial amount of the money so invested for his personal use; that he falsely represented that he was the holder of numerous scholastic degrees and was a licensed physician; that he told members he had acquired a substantial tract of land in Bangor, Michigan to which members could retire, whereas petitioner did not intend to and did not acquire land and buildings suitable as living quarters.

The evidence for the Government as to the scheme to defraud may be summarized as follows:[2]

In 1935 petitioner gave courses of lectures in Pittsburgh, Pennsylvania under the name of the Neological Foundation (R. 193, 203, 251). He told his followers there that he was of noble English parentage and had been a flying parson during World War I; that he had been injured and had cured himself by the methods he taught (R. 251). He induced two of his followers there to invest $2100 and $2050, respectively, for the expansion of the Foundation, promising them 10% interest in return (R. 193–194, 251). He made no payment on the first loan (R. 194), and paid only $1,000 on the second (R. 252).

In 1936 petitioner transferred his headquarters to Chicago (R. 194, 203, 252). There he conducted radio programs by means of which he attracted followers (R. 188, 192, 197, 205, 208, 209, 225, 231, 233, 236, 253, 255, 264, 265, 279). Persons interested became members of the Neological Foundation, paying dues of $2 per month (R. 192, 209, 229). The Foundation grew from a membership of 200 in 1938 to a membership of 4,000 (R. 227, 229, 397). Petitioner would address the

[2] No question is raised here as to the sufficiency of the evidence to establish the use of the mails in execution of the scheme. There was abundant evidence that petitioner made extensive use of the mails (R. 189, 191, 198, 199, 201, 203, 205, 208, 210, 215, 224, 225–226, 261).

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membership at meetings in Chicago on his philosophy of self-betterment and would also urge members to invest money with him (R. 189, 191, 208, 209, 228, 279, 281). He represented that he came of a prominent English family (R. 221, 231); that he had studied for years in a lamasery in Thibet (R. 221, 231, 257, 260, 270, 274, 282), and that he had been a flying parson during World War I and had been blinded, but had cured himself (R. 221, 231, 280, 282); that he had numerous scholastic degrees, including that of doctor of medicine (R. 189, 227–228, 257, 260, 268, 270, 274, 280, 282). Petitioner's attorney stipulated at the trial that, prior to 1934, petitioner was known under the name of Henry J. Boerum and that, except for a period in the latter part of 1919 and 1920, he was never out of the territorial boundaries of the United States (R. 214). Petitioner was fifteen years old when he attended the fourth grade of the public school in Brooklyn, New York (R. 246), and worked in the post office for a period of nine years (R. 247, 259).

Petitioner represented that he was independently wealthy and drew no salary from the Foundation (R. 196, 211, 220, 228, 244, 260, 272), that those who invested money in the Foundation would receive interest at 6% plus a bonus of 4% (R. 208, 228, 244, 253, 274), and that investment in the Foundation was a very safe one (R. 220, 222, 234).

In 1938 petitioner stated that he had acquired a formula for a shampoo known as Nan-Gene (R. 191). He said that one element of the shampoo was an Indian soap bark tree which he had seen used in India, and that he could obtain that material through a New York importer (R. 279, 282). He promised that those who invested in the product would receive interest at 6% plus a bonus at 4% per annum, and, according to some witnesses, would in addition be paid a 50% dividend within three years (R. 187, 191, 195–196, 211, 216, 218, 231, 248, 255, 277, 279). He also said that investors could get their money back at any time (R. 190, 196, 208, 218). He stated that he had a separate fund on deposit to assure protection of the investment (R. 212; see also R. 187, 189, 237, 248). A few sample bottles of Nan-Gene were displayed and sold to members (R. 187, 191, 218; see R. 239–241).

In 1939 he told the membership that the formula had proved unsatisfactory, and that instead of Nan-Gene a laxative known as Happy Hearts would be sold and the investment transferred to that product (R. 187, 191, 211, 218, 223, 242, 278). He again promised that investors would receive interest at 6% plus a 4% bonus (R. 215, 216, 270). Happy Hearts was never manufactured (R. 187, 218, 403).

A number of witnesses testified that they had made investments for the exploitation of these

products (R. 195–196, 206, 212, 215, 216, 231, 234, 237, 242, 248, 255, 270, 272, 277) or had invested in the Foundation's activities (R. 197, 199, 208, 210, 219, 222, 234, 244, 253, 261, 265, 274). Most of these people either received no payments whatsoever (R. 197, 210, 218, 222, 254, 272) or received back only a part of their original investment (R. 199, 206, 208, 217, 225, 231, 235, 237, 244, 248, 265, 270, 276, 277). The money that was paid back to the lenders came from funds loaned by others (R. 285). As of December 1943, the Foundation owed about $180,000 (R. 283, 285). Petitioner withdrew substantial funds from the Foundation for his personal use (R. 227; Gov. Ex. 210–212, R. 288–289).

Petitioner also conducted a medical clinic where persons were treated for a fee (R. 189, 229, 237) and set up, as a consulting psychologist, one Catherine Jones who had no degree and whose formal education consisted of two years of normal school (R. 189, 219–220).

The building acquired by petitioner in Bangor, Michigan, which was represented as being a haven for members of the Foundation (R. 264–265), consisted of a house used for offices which had no living quarters (R. 262, 372–373, 433).

ARGUMENT

1. As shown by the Statement, *supra,* the indictment in this case was based wholly upon petitioner's business activities and not on his teachings.

The scheme to defraud alleged was in essence one to obtain loans by promises of extravagant returns. The false representations set forth in the indictment did not relate to the ideas which petitioner taught, but to his claims of wealth, education and experience, and his unfounded guarantees of future income resulting from purported commercial business activities. The direct testimony of the government witnesses was almost exclusively confined to an account of their business dealings with petitioner. Only one government witness, an early follower in Pittsburgh, testified on direct examination to the details of petitioner's theories, and her testimony in this respect was brief and merely incidental to an account of her loans to petitioner (R. 251). On cross-examination by petitioner's counsel, government witnesses gave varying answers describing petitioner's teachings as dealing with religion, philosophy, or economic self-betterment (e. g. R. 190, 193, 195, 196, 213, 216, 238, 243–244, 255, 260, 273). One witness testified that at the beginning the meetings were not religious, but that later they were converted into religious meetings (R. 239; see also R. 231).

The defense called more than 50 witnesses, many of whom testified that petitioner's teachings were of a religious nature (R. 291, 294, 304, 308, 311, 313, 318, 320, 331, 336, 338, 341, 343, 346, 350, 354, 357, 360, 363, 367, 368, 371, 372, 374, 376,

377, 378, 380, 384, 387, 388, 391, 393, 410, 411, 419). Thirteen of these witnesses testified during cross-examination as to the nature of petitioner's teachings on breathing and on silence (R. 291–292, 298, 310, 320–321, 329–330, 344–345, 347, 356, 365, 369–370, 381–383, 391–392, 413), and seven others testified that they did not study or were not interested in the subject of breathing (R. 300, 303, 323, 333, 379, 416, 420). In his summation to the jury the prosecutor stated (R. 450–451):

> The position of the Government in this case is this man Boerum attempted to defraud a group of innocent people by false misrepresentation, pretenses and promises. We are not trying religion. We don't intend to try religion. If he or any other person in this world desires to believe that it is his religion to breathe out of the left nostril, to breathe or inhale through the left nostril and exhale through the right, and he thinks that is his religion, let him believe it if he wants to. If he wants to go into silence or science of relaxation or prayer, let him believe it, we won't interfere with him, that is his right. If he wants to believe some of the other things that had been stated here, let him believe them. But when he comes out to these poor innocent people and he falsely represents to them as he did in the golden book, Government's Exhibit 184, that he has a master of science degree, that he is a Doctor of Divinity, that he has a Ph. degree, that he is a F. R. S., and

F. N. S., and he is a man of wide experience and tells them that he studied for more than twenty-one years in the Lamaseries of Changu Narain, in Khatmandu, Nepal; and of Kum Bum on the shore of the Great Blue Lake in Southeast Thibet—when he tells them that his life has been devoted to the betterment of others, as well as an example of results obtained by consistent application of the wisdom of the age—and when he tells them that he wants to borrow their money and he will pay them 6 percent interest and 4 percent bonus and 50 percent at the end of three years, then I say to you, ladies and gentlemen of the jury, it then becomes our duty to step in * * *.

The trial judge instructed the jury as follows (R. 455–456):

The first amendment of the constitution of the United States provides as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

This provision of the constitution as a matter of law, protects the defendants, and each of them, from any inquiry by you into the truth or falsity of any of the religious beliefs, or doctrines, or representations made by the defendants, or any of them, which dealt with such beliefs or doctrines. In the consideration of the question of the guilt or innocence of the defendants in this case you must assume that any and all representations made by the defendants,

> or any of them, concerning matters pertaining to their religious beliefs or doctrines, were true at the time they were made, and this is so, irrespective as to whether such representations were written or oral, or partly written and partly oral, or merely based upon inferences which you may draw from printed or written documents in evidence.
>
> You are further instructed that representations of the defendants, or any of them, concerning or relating to the subjects of breathing, silence, and position of persons during sleep, if you believe that they are matters within the field of religion, as taught by the defendant Carruthers, and the truth or falsity of such representations, if any, may not be questioned in any way by you in arriving at your verdict in this case.

He then summarized the indictment at length (R. 457–460) and instructed the jury that (R. 461–462):

> The burden in this case is upon the Government to prove beyond a reasonable doubt that the alleged false pretenses, representations and promises were made as charged in the indictment. It is not, however, necessary that the Government should prove all of the pretenses, representations and promises charged, but it is essential that one or more of them must be proved beyond a reasonable doubt, and that the scheme to defraud charged in the indict-

ment should be substantially established by the evidence.

Petitioner contends (Pet. 2–3, 10–11, 16, 17–27) that the instruction relating to his theories of breathing and silence violated the First Amendment in that it allowed the jury to determine whether his ideas were of a religious character. However, as the circuit court of appeals pointed out (R. 511–512), there was a real question under the evidence in this case as to whether this part of petitioner's teaching was advanced as religious doctrine. In any event, it is clear that the instruction has none of the significance which petitioner attempts to attach to it. The indictment, the evidence, the prosecutor's summation, and the judge's charge made it abundantly clear to the jury that petitioner was being tried for his business activities alone and not for his preachings. The instruction complained of came before the judge summarized the indictment and, read in its context, in effect eliminated the question of petitioner's theories as an issue in the case. The jury was specifically told that it must find a scheme substantially as alleged in the indictment and at least some of the false representations set forth in the indictment, all of which related to commercial matters. Hence, in order to convict, the jury had to find and, on ample evidence, it did find, that petitioner had devised a scheme and made false representations which clearly fall outside of

the field of religion or philosophy. Petitioner was convicted, not for what he taught, but for practicing ordinary mundane fraud in commercial transactions.

2. The presentation of evidence in the case concluded in the afternoon of Friday, February 16, 1945, and the jurors were allowed to go home over the week end. That evening an article relating to the trial appeared in the Chicago Daily News. (R. 438–439.)[3] On Monday morning, petitioner's

[3] The article was as follows:

"Lama Dodges Questioning on Robbery.

The Kum Bum Lama dodged the witness stand in his Federal Court fraud trial this afternoon, and averted a showup of his career as highway robber before he grew a beard and named himself Dr. Hugh Greer Carruthers.

The defense rested, and then Judge Philip L. Sullivan denied a defense motion for a directed verdict of not guilty offered for Carruthers. The judge held in abeyance, until he receives the jury's verdict, motions for directed acquittal of the other defendants, Evelyn Kroell and Mary Morel.

Prosecutor Francis J. McGreal had planned to put into the record, in cross-examination, the fact that Carruthers, under his real name of Henry Boerum, Jr., served a prison term in New York state for highway robbery.

The failure of Carruthers to testify prevented this.

The defense attorneys, Walter Bachrach and Edward Hess asked a directed acquittal on argument that Carruthers' Neological Foundation was a religion, like the 'I am' cult, whose sponsors won in the high courts.

The Defense had conceded in court that the 'doctor' was really only Henry, a postal clerk from Brooklyn, and had not been educated as a lama in Tibet, but had merely learned the alphabet and some words as a fifth grade pupil in a Brooklyn public school.

Closing arguments will begin Monday."

counsel called this fact to the attention of the court and moved for a mistrial (R. 437–439). At the request of defense counsel, the judge asked the jurors collectively whether they had read the article published in the News. One juror, Vincent, replied "I might have. I don't remember it unless I saw it again." The trial judge then reminded the jury that he had previously told them that the only evidence they were to consider was that presented in the court room, and that they were to disregard anything that they might have read. (R. 440.) Each juror was then asked individually whether he had read the article, and all except Vincent stated that they had not seen it (R. 441–442). The following colloquy took place between Vincent and the court (R. 441):

> Juror VINCENT. I remember it. I would like to see it again, to be sure. I read the News. I probably read it.
>
> The COURT. Do you recall now if there was anything in the article, if you did read it, that was not in evidence in this case, in this courtroom?
>
> Juror VINCENT. I read in the paper something. The rest I didn't hear. It was discussed after the case was dismissed Friday afternoon.
>
> The COURT. It was discussed by whom?
>
> Juror VINCENT. A motion was made by the defendants.
>
> The COURT. Yes.
>
> Juror VINCENT. That is what I read.

The COURT. That is purely a legal question.

Juror VINCENT. That is what I figured.

The COURT. Anything else except the denial of that motion.

Juror VINCENT. That is what I recall.

The COURT. For your information, that is done in every case.

Juror VINCENT. That is all I recall of the article.

The COURT. That means whether it is a question of law for the Court or jury to pass upon. That is what you have reference to?

Juror VINCENT. That is my understanding.

The trial judge denied the motion for a mistrial (R. 442).[4] At the opening of his charge to the jury, the judge again instructed them that they were to consider only the evidence presented in open court and were not to be influenced by any articles which might have appeared in a newspaper (R. 454).

It is clear that the trial judge, in passing on petitioner's motion for a mistrial, acted with care and deliberation, and denied the motion only after his examination of the individual jurors had convinced him that petitioner had not been prejudiced. There is thus no merit in petitioner's con-

[4] The judge considered substituting an alternate juror for Vincent but concluded that such action would not be proper under the statute (R. 453).

tention (Pet. 3–4, 11–12, 16, 27–37) that the denial of his motion constituted an abuse of discretion. The cases relied upon by petitioner (Pet. 33–36) are distinguishable in that it was affirmatively shown that a number of jurors had read the offending articles. Here, only one juror had seen the article in question, and he had merely a vague recollection of its contents. Under the circumstances we think that the circuit court of appeals properly held that there was no abuse of discretion on the part of the trial judge in denying petitioner's motion for a mistrial (R. 515). See *United States* v. *Keegan*, 141 F. 2d 248, 258 (C. C. A. 2), reversed on other grounds, 325 U. S. 478; *Welch* v. *United States*, 135 F. 2d 465 (App. D. C.), certiorari denied, 319 U. S. 769; *Shushan* v. *United States*, 117 F. 2d 110, 116 (C. C. A. 5), certiorari denied, 313 U. S. 574; *Beard* v. *United States*, 82 F. 2d 837, 844 (App. D. C.); *Klose* v. *United States*, 49 F. 2d 177, 182 (C. C. A. 8); *Stunz* v. *United States*, 27 F. 2d 575 (C. C. A. 8); *McHenry* v. *United States*, 276 Fed. 761, 764 (App. D. C.); cf. *Holt* v. *United States*, 218 U. S. 245, 250–251.

3. The trial judge gave the following instruction on the presumption of innocence (R. 454):

> * * * The defendants under the law are presumed to be innocent of the charge. This presumption remains throughout the trial with the defendants until you have been satisfied by the evidence in the case

> beyond all reasonable doubt of the guilt of the defendants or either of them.
>
> This presumption of innocence is not intended to aid anyone who is in fact guilty of crime to escape, but is a humane provision of the law intended, so far as human agencies can, to prevent an innocent person from being convicted.

No exception was taken to this portion of the charge, but petitioner now assigns as error the statement that the presumption was not designed to protect one who was in fact guilty (Pet. 4, 12, 13, 16, 37–40). He relies on *Gomila* v. *United States,* 146 F. 2d 372, in which the Circuit Court of Appeals for the Fifth Circuit reversed a conviction in a case which it considered doubtful on the evidence because of an accumulation of errors, including a charge similar to the one given here. That the court did not consider the mere giving of such instruction ground for reversal is shown by its refusal to reverse the conviction in another case in which the same statement was made. *Pasqua* v. *United States,* 146 F. 2d 522 (C. C. A. 5), certiorari denied, 325 U. S. 855 (see Government's brief in opposition in that case, No. 1047, October Term, 1944, pp. 9–13). It is doubtful that the criticism of the charge in the *Gomila* case is sound. We see nothing prejudicial to a defendant in the statement that the presumption of innocence is not designed to protect one who is shown beyond a reasonable doubt to be

guilty, particularly where, as here, the charge is followed by a definition of reasonable doubt (R. 454). In essence, it is not very different from the charge approved by this Court in *Allen* v. *United States,* 164 U. S. 492, 500, a capital case. See also, *Boehm* v. *United States,* 123 F. 2d 791, 811 (C. C. A. 8), certiorari denied, 315 U. S. 800. In any event, it is clearly not the kind of error which may properly be raised for the first time on appeal. *Pasqua* v. *United States, supra.* Cf. *Johnson* v. *United States,* 318 U. S. 189, 201; *Holmgren* v. *United States,* 217 U. S. 509, 523–524; *Allis* v. *United States,* 155 U. S. 117, 122.

CONCLUSION

The decision below is correct and the case presents no real conflict of decisions or question of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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FEBRUARY 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946